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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEZMON FRAZIER,

Defendant and Appellant.

A145958

(Solano County
Super. Ct. No. FCR286009)

Defendant Dezmon Frazier appeals from the imposition of a restitution order. The sole issue before us is whether the trial court erred by calculating the economic losses of the victim's spouse based on the gross revenue of the victim's business, as opposed to the business's net income. We conclude the trial court abused its discretion and reverse.

I. BACKGROUND

Defendant was charged by an amended felony complaint with murder (Pen. Code,¹ § 187, subd. (a); count 1), second degree burglary (§ 211; count 2), elder abuse resulting in death (§ 368, subd. (b)(1); count 3), elder abuse (§ 368, subd. (b)(1); count 4), conspiracy to commit a crime (§ 182, subd. (a)(1); count 5), false imprisonment by violence (§ 236; count 6), and three counts of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); counts 7 to 9). Pursuant to a plea agreement, defendant pleaded no contest to counts 2 through 9, and the trial court dismissed the murder count (count 1). Defendant was sentenced to 23 years 8 months in prison.

¹ All statutory references are to the Penal Code.

The charges arose out of the robbery of the Travis Dairy, a retail store in Fairfield. Defendant admitted he conspired with four other codefendants to commit the robbery. In the course of the crime, one of the conspirators sprayed the elderly store proprietor with pepper spray. The emotional distress of the assault caused the victim to go into cardiac arrhythmia. The victim died of cardiac arrest en route to the hospital. The conspirators absconded with \$60, the contents of the store's cash register.

The victim's wife submitted a claim to the Victim Compensation and Government Claims Board (VCB), which paid her a total of \$68,187.50 in restitution out of the state's Restitution Fund—\$5,000 for burial expenses, \$63,000 for support loss, and \$187.50 for “mental health” expenses. VCB apparently calculated support loss by considering the victim's average gross income for 2009 and 2010, but did not deduct the victim's operating expenses.² Defendant objected to the prosecution's request to recover the restitution paid by the VCB, arguing support loss should have been calculated using the victim's net profits, not his gross income. The trial court approved the prosecution's request.

II. DISCUSSION

Defendant argues the trial court abused its discretion by calculating restitution using the victim's gross income, rather than his net income. We agree and reverse.

Under the California Constitution, victims of crime have a right to receive restitution directly from persons convicted of the crimes for losses they suffered. (Cal. Const., art. I, § 28, subd. (b).) “Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (*Id.*, art. I, § 28, subd. (b)(13)(B).) The statutory scheme provides that, to the extent possible, a restitution award must “be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss

² The Attorney General suggests the award was also used to pay off the business's debts. However, the only support cited are the prosecutor's arguments at a hearing, which are not evidence.

incurred as the result of the defendant's criminal conduct, including" the "[w]ages or profits lost by the victim." (§ 1202.4, subd. (f)(3)(E).)

"[T]he statutory language makes clear that the Legislature intended to limit restitution to the victim's economic losses and to mitigate those losses to the extent possible." (*In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017.) "A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall. [Citations.] While the court need not order restitution in the precise amount of loss, it 'must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious' " (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172.)

In this case, the support losses awarded should have been limited to net profits from the victim's business, that is the business's gross revenues less any operating expenses, including labor, materials, and rents. (See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884 [discussing the concept of net profits].) The trial court's failure to deduct operating expenses was an abuse of discretion. Had the victim lived and continued to operate the business, any revenue he earned from it would have been reduced by the business's expenses. Thus, failing to account for those expenses overstated the actual economic losses resulting from defendant's crime.

The Attorney General's arguments on this point are not persuasive. First, the Attorney General points out that, under section 1202.4, subdivision (f)(2), the amount of restitution ordered shall not be affected by the indemnification or subrogation rights of any third party. A victim is entitled to receive the full amount of loss caused by the crime, regardless of whether the victim has purchased private insurance that covers some or all of the same losses. (*People v. Birkett* (1999) 21 Cal.4th 226, 246.) But the fact the statute allows for double recovery in the event a loss is insured does not mean it also permits courts to ignore the actual economic loss suffered by a victim in all cases.

Next, the Attorney General argues we should affirm because the trial court has broad discretion to set the amount of restitution. We do not dispute the trial court's order is reviewed under the deferential abuse of discretion standard. (*People v. Giordano*

(2007) 42 Cal.4th 644, 663 (*Giordano*).) But even under this test, there must be a rational basis for the trial court's award. (*Id.* at p. 664.) Here, neither the trial court nor the Attorney General has offered any rational basis for calculating the loss of support based on gross revenue as opposed to net income.

The Attorney General asserts the award should be presumed correct under section 1202.4, subdivision (f)(4)(A), which states: "If, as a result of the defendant's conduct, the Restitution Fund has provided assistance to or on behalf of a victim or derivative victim . . . , the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered." The statute also specifies the way in which the claim is established by submission of the bills submitted to VCB and paid by the Restitution Fund. (§ 1202.4, subd. (f)(4)(B).) The Attorney General argues the required bills were submitted in this case, and thus the amount awarded is presumed correct. But nothing in the statute states economic losses may be calculated using gross, rather than net, income. Moreover, the presumption that the amount of assistance provided by the Restitution Fund is correct is rebuttable. (§ 1202.4, subd. (f)(4)(C).) Thus, we are not bound by the VCB's determination.

The case law cited by the Attorney General also does not support the use of gross income to determine restitution. In *Giordano*, the trial court calculated the surviving victim's economic loss by multiplying the decedent's average annual earnings over the three years prior to his death by five years. (*Giordano, supra*, 42 Cal.4th at p. 663.) Our Supreme Court found "[t]his method of calculation assumes that [the surviving spouse] was entitled to receive her husband's gross annual earnings, not just that portion of his earnings that went to her economic support." (*Id.* at p. 665.) Nevertheless, despite the trial court's "methodological imprecision," the restitution award was upheld. (*Id.* at p. 666.) The court noted the decedent was relatively young when he was killed by the defendant, and the defendant failed to show that a method designed to approximate the wife's loss of economic support, taking into consideration the deceased victim's anticipated years of contribution to his wife's support, would have resulted in an amount

of restitution less than that awarded. (*Ibid.*) In contrast, in the instant action, defendant has presented evidence the victim's net income was substantially less than his gross income, and the Attorney General has yet to point to anything suggesting an alternative calculation of loss of support would have resulted in a greater or equivalent restitution award.^{3, 4}

III. DISPOSITION

The restitution award is reversed. We remand for the calculation of restitution consistent with this opinion.

³ *People v. Thygesen* (1999) 69 Cal.App.4th 988, is also inapposite as that case does not address the distinction between gross and net income. In that case, the defendant pleaded guilty to the theft of a rented cement mixer. (*Id.* at p. 991.) The court reversed a restitution award based on the loss of rent by the victim, finding it was based on the speculative proposition the mixer would have been rented every week for 13 months. (*Id.* at p. 995.)

⁴ Nothing in this opinion precludes the prosecutor from offering an alternative calculation of restitution on remand.

Margulies, J.

We concur:

Humes, P.J.

Banke, J.

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